84-1042

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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN RE LYKES BROS. STEAMSHIP CO., INC., *Debtor*
MARSHALL P. SAFIR,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Whether Rule 7 of the Federal Rules of Appellate Procedure was construed beyond its scope and applied inconsistently in this and related cases in a manner which transgressed the terms of the Rules Enabling Act (28 U.S.C. § 2072 as amended in 1979).

Whether petitioners substantive statutory right to appeal was thereby abridged under the guise of regulating the adjective law of judicial procedure.

LIST OF PARTIES

Lykes Brothers Steamship Co., Inc.
(formerly owned by LTV Corporation)

Marshall P. Safir

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OPINIONS BELOW

The history of the litigation is reported in *Safir* v. *Gibson*, 417 F.2d 972 (2nd Cir. 1969), Safir I; *Safir* v. *Gibson*, 432 F.2d 137, 145 (2nd Cir.), cert. denied subnom. *American Export et al.* v. *Safir et al.*, 400 U.S. 942 (1970) (Safir II); *Safir* v. *Blackwell*, 469 F.2d 1061 (2nd Cir. 1972), Safir III; *Safir* v. *Kreps*, 551 F.2d 445 (D.C. Cir.), cert. denied 434 U.S. 820 (1977), Safir IV; *U.S. ex. rel. Safir & Safir* v. *American Export et al.*, 579 F.2d 747, cert. denied 441 U.S. 942 (1978), Safir V.

The most recent consideration by this Court in the protracted litigation was the denial of a petition for certiorari,

#83-1627, from the decision of the U.S. Court of Appeals for the D.C. Circuit in *Safir* v. *Dole,* 718 F.2d 475 (1983), on May 21, 1984, rehearing denied on June 25, 1984.

The Dismissal Order of June 1, 1984 (A-2) by the D.C. Circuit in *In re Lykes, Debtor,* C.A.D.C. #84-5107 for failure to post a bond ordered by the District Court (A-3) forms the basis for this petition. A petition for rehearing (A-4) and an en banc suggestion (A-5) were denied on August 1, 1984.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

RULES OF COURTS
28 § 2072

The Rules Enabling Act, 28 U.S.C. § 2072 (1970), provides in pertinent part:

> The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in the district courts of the United States in civil actions.
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

APPEALS FROM DISTRICT COURTS
Rule 7. Rules of Appellate Procedure

Rule 7. *Bond for Costs on Appeal in Civil Cases*

The district court may require an appellant to file a bond or provide other security in such form and amount

as it finds necessary to ensure payment of costs on appeal in a civil case. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This rule is derived from FRCP 73(c) without change in substance.

1979 AMENDMENT

The amendment would eliminate the provision of the present rule that requires the appellant to file a $250 bond for costs on appeal at the time of filing his notice of appeal. The $250 provision was carried forward in the F.R.App.P. from former Rule 73(c) of the F.R.Civ.P., and the $250 figure has remained unchanged since the adoption of that rule in 1937. Today it bears no relationship in actual costs. The amended rule would leave the question of the need for a bond for costs and its amount in the discretion of the court.

§ 2075. *Bankruptcy rules* (In pertinent part.)

The Supreme Court shall have the power to prescribe by general rules the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under Title 11.

Such rules will not abridge, enlarge, or modify any substantive right.

Rule 8006. Record and Issues on Appeal

Within 10 days after filing the notice of appeal as provided by Rule 8001(a) or entry of an order granting leave to appeal the appellant shall file with the clerk of the bankruptcy court and serve on the appellee a designa-

tion of the items to be included in the record on appeal and a statement of the issues to be presented.

STATEMENT OF THE CASE

This Petition for Certiorari is being filed pursuant to an extension of time granted by Chief Justice Burger to December 29, 1984 (A-1). The extension had been granted on October 19, 1984 to await the outcome of a related petition for rehearing in the D.C. Circuit of *In re American President Lines Ltd., Debtor,* C.A.D.C. #84-5228 (A.P.L.), which petitioner had filed on August 14, 1984. The Court of Appeals had dismissed that appeal for failure to post bond under Rule 7 F.R.A.P. on July 31, 1984 in the amount of $10,000 (A-6). The District Court (Oberdorfer, J.) had ordered such cost bond on June 29, 1984 (A-7). The District Court (Oberdorfer, J.) had earlier on March 9, 1984 dismissed an appeal from an involuntary bankruptcy petition in A.P.L. (A-8) citing as precedent the dismissal by the District Court (Gesell, J.) in *In re Lykes* of February 9, 1984 (A-9).

American President Lines Reversal

On November 28, 1984 the Court of Appeals acted on the A.P.L. petition by reversing the order of dismissal of June 1, 1984 and remanding the record to Judge Oberdorfer (A-10). The Petition for Rehearing (a copy of which was attached to Supreme Court application A-292) raised the identical issues which form the subject matter of the statutory question in this petition—whether Rule 7 F.R.A.P. has, by construction of its scope and intent under the Rules Enabling Act as amended in 1979 (28 U.S.C. § 2072) been applied in a manner to abridge the substantive rights of this litigant and others.

While the Court of Appeals below gave evidence of its dissatisfaction with the specific instance of transgression

via excessive bond of the right of this litigant to appeal in the A.P.L. case, the Court did not address the relationship of the A.P.L. case (and its identical issues) to the instant petition nor did the Court act to recall the mandate in *In re Lykes* which would have precluded the invocation of Title 28, U.S.C. § 1254(1).

This inconsistency leaves this petitioner without other recourse than to invoke the statute because of the finding, erroneous as it may be, of one bankruptcy judge that his restitutionary claim is invalid under 11 U.S.C. § 101(4)(9) and without remedy from the finality of a "bad faith" money judgment against him and in favor of the respondent in this petition under 11 U.S.C. § 303(i) for costs, expenses and attorneys fees. The judgment in the Lykes case was $23,686.77 (A-19, 20).

The Restitutionary Claims

The nature of petitioner's claims against certain steamship lines was detailed in the Petition for Certiorari #83-1627 in *Safir* v. *Dole, supra.* The recovery claimed approaches in some cases and exceeds in others the total asset value of the ship lines involved when interest is compounded since 1966.

In anticipation of the affirmation in "Dole" of the administrative and/or district court judgment of liability for violation of § 810 of the Merchant Marine Act of 1936 (46 U.S.C. § 1227), a spate of major changes of ownership of the violating ship lines had occurred under a pattern formerly considered indicative of the first act of bankruptcy—fraudulent conveyance, now Title 11, U.S.C. § 548 under the new bankruptcy code.

Leveraged buyouts of the stock of two of the violators 1) Lykes Bros. Steamship Co. Inc. sold by LTV Corp. to members of the Lykes family (who were themselves major stockholders of LTV) using the proceeds of the mortgag-

ing of Lykes Lines assets for purchase money payments to LTV Corp. and 2) the sale of Moore McCormack Lines Inc. by its parent Moore McCormack Resources Inc. to McLean Industries Inc. (owner of U.S. Lines, another violator) on a similar basis.

In addition 3) the sale of Delta Steamship Lines by Holiday Inns Inc. to Crowley Maritime Corp. where certain Delta ships were formerly owned by the Grace Lines, a violator subject to recoveries; 4) the merger of Diamond Shamrock Corp. with Natomas Corp. and the simultaneous spinoff of American President Lines Ltd., another violator thereby separating the merged entity from its former troubled subsidiary; 5) the partial liquidation of the assets of Farrell-American Export Lines Inc. to satisfy preferred creditors prior to execution of a money judgment anticipated by the Safir litigation.

Petitioners restitutionary claims are founded in the secondary private right of action addressed in *Trans-America Mtge. Advisors* v. *Lewis*, 444 U.S. 11, 18-19 (1979) and that he has met the test of *Cort* v. *Ash*, 422 U.S. 66 (1975) when judgments for violation of certain federal statutes are *res judicata* as to liability.

Petitioner filed four involuntary bankruptcy petitions and these were all dismissed by the Bankruptcy Court (Whelan, B.J.) in July 1983 and they were then appealed to the District Court. *In re Farrell* and *In re Lykes* were assigned to Judge Gerhard Gesell, "A.P.L." and "Moore-McCormack" to Judges Oberdorfer and Sirica.[1] The dismissals had included "bad faith judgments for costs ex-

[1] Regrettably Judge Sirica recused himself from the Moore McCormack appeal and the docket sheet shows that the case was reassigned to Judge N. H. Johnson. The closed docket reveals that Judge Johnson filed a similar order of dismissal of the appeal on grounds of the B.R. 8006 infraction on April 19, 1984. (A-31-32). There was no notice to this appellant of that action by the District Judge so that a timely appeal could be filed along with the others to the Court of Appeals.

penses and attorneys fees against this petitioner of approximately $90,000.

The Farrell Bond

The first appeal acted upon was that of *In re Farrell, Debtor* (Gesell, J.) wherein the Court dismissed the appeal on grounds that an appeal bond in the amount of $25,000, which had been ordered by the bankruptcy court (Whelan, B.J.) (A-21, 23), had not been posted (A-24-26). This bonding requirement was upheld by the district court notwithstanding that the appeal bond included the amount of the "bad faith" judgment and no supersedeas for stay under Rule 8 F.R.A.P. existed (A-27) or had been requested from Judge Gesell. This Court has long held that a bond for costs on appeal covers costs only and does not extend to the amount of the judgment. *Orchard* v. *Hughes,* 68 U.S. 73; followed in *Aetna Life Insurance* v. *Ryan,* 253 F. 457; *Martin* v. *Clarke,* 105 F.2d 685 (7th Cir. 1939); *City of New York* v. *Slayne,* 1 F.R.D. 742 (E.D.N.Y. 1941).

Contrary to the bonding order in *In re Farrell* however, a motion by counsel for Lykes for the cost bond of $30,000 to include the amount of the judgment in the instant case was denied by Bankruptcy Judge Bason (who had replaced Bankruptcy Judge Whelan) on the grounds that B.R. 8005 was inapposite as no stay pending appeal was in existence (See A-28, 29).

While that motion for such bond was *sub judice* before Bankruptcy Judge Bason, Judge Gesell finding other grounds, acted *sua sponte* to dismiss the Lykes appeal on an infraction of B.R. 8006 (A-11) failure to file a Statement of Issues and followed same by setting the bonding amount for appeal to the Court of Appeals on an evaluation that the appeal was frivolous[2] (A-3). This order was effective after the denial of a motion to vacate was denied on March 23, 1984 (A-30). The District Court did not then clarify whether "frivolous" in the affirmed order now referred to the appeal of the merits of the involuntary

petition or to an appeal of whether the District Court exceeded its procedural jurisdiction in invoking the sanction of dismissal for a non-prejudicial infraction of B.R. 8006. Petitioner will show that in either case the characterization is irrelevant to the discretion authorized by Rule 7.

REASONS FOR GRANTING THE WRIT

The Rules Enabling Act (28 U.S.C. § 2072) declares that the rules are to regulate only practice and procedure and are not to "abridge, enlarge or modify any substantive rights. Particular rules have been attacked as affecting matters of substance, but this court in a notable review of decisions has primarily upheld such rules challenged before it. *Sibbach* v. *Wilson,* 312 U.S. 1, 10-15 (1941); *Mississippi Publishing* v. *Murphree,* 326 U.S. 438, 445, 446 (1946); *Hanna* v. *Plumer,* 380 U.S. 460, 470-472 (1965).

This Court, however, has been careful to note that the scope of certain rules was not sufficiently broad to control the issue before the deciding Court, *Walker* v. *Armco Steel Corp.,* 446 U.S. 740, 748-751 (1979), or the rule as construed and applied in a certain case was inconsistent in that it impaired a party's right to appeal to the Court of Appeals under 28 U.S.C. § 1291—a substantive right conferred by the statute. *See Davidson Marble Co.* v. *Gibson,* 213 U.S. 10, 18 (1908).

The variants that go into the equation of that which constitutes "substantive" versus "adjectival or procedural" have been the subject of much precedential dicta in this Court's past decisions, i.e., *Erie Railroad* v. *Tompkins,* 304 U.S. 64 (1938) and *Guarantee Trust* v. *York,* 326

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[2] As no Statement of Issues had been filed by this appellant, there were no grounds on which to make a "frivolous" determination. The evaluation presumably was based on familiarity with the issues in *In re Farrell* that Judge Gesell had dismissed on the cost bond grounds which the new Bankruptcy Judge would not sustain for Lykes nor, had he been sitting, for "Farrell."

U.S. 99, 109 (1945). It has recently been addressed by Justice Stevens concurring in *Daily Income Fund* v. *Fox*, 52 U.S.L.W. 4119, 4125 note 2 (January 17, 1984).

When, however, a district judge acting under the discretion granted to determine the amount of the cost bond on an appeal of his own decision to the Court above, sets that bond knowingly beyond the ability of the appellant to pay and beyond the clear meaning of "costs" covered by the rule, the draconian result is not "an incidental effect" of a 1979 procedural amendment to the Rule as discussed in *Mississippi* v. *Murphree, supra* at 445, 446. It is a substantive effect which abridges adjudication under the Rules of Decision and the rules of right from the Judiciary Act of 1789, through the Evarts Act, 26 Stat. 826 (1891) and as amended to the present day.

Rule 7 F.R.A.P. as applied in this case transgresses both the terms of the Enabling Act and petitioner's rights under the substantive statute which insured review of error on appeal, *Hanna* v. *Plumer, supra* 491. Neither the Advisory Committee nor Congress nor this Court ever suggested that "the federal courts can under the guise of formulating rules of decision fashion rules which are not supported by a grant of federal authority contained in Article I, . . ." *Sibbach* v. *Wilson, supra* at 13-15. The scope of Rule 7 is not sufficiently broad to include a mandatory 7 day time limit for the posting of such excessive bond nor does the discretion granted in setting bond for costs on appeal grant jurisdiction to evaluate through the cursory use of one word "frivolous" an appeal from its *sua sponte* two-sentence order of dismissal on grounds of non-compliance with Bankruptcy Rule 8006 (see A-11). Contrast *Carr* v. *Grace*, 516 F.2d 502, 504 (5th Cir. 1975). This is an enlargement of jurisdiction not contemplated by this Court. *U.S.* v. *Sherwood*, 312 U.S. 584 (1941). The merits of the case had already been briefed by the appellant prior to dismissal and these identical merits

are now *sub judice* in the Court of Appeals below in *In re Farrell, Debtor,* C.A.D.C. #83-2246. Thanks are due primarily to the overzealous inclusion by the same judge of the amount of the judgment in his bonding requirement in that related case as discussed, *supra.*

The Court of Appeals in its reversal and remand on rehearing in *In re American President Lines Inc., Debtor,* C.A.D.C. 84-5228, did not address the propriety of the District Court including potential costs and fees the appellate court may later award to the final successful party. Nor did the Court address the issue whether Rule 7 cost bonds by the District Court were ever intended to be determined on the frivolousness or the merit of the underlying appeal.

At this moment the inconsistency between the dismissal of "Lykes" and the remand of A.P.L. leaves this petitioner without other remedy from the resulting injury of the existing, albeit erroneous, finding of one bankruptcy judge that his restitutionary claim against Lykes is invalid under 11 U.S.C. § 101(4)(9)(30) of the Bankruptcy statutes and from the finality of a "bad faith" money judgment against him and in favor of respondent Lykes in excess of $23,000 under 11 U.S.C. § 303(i).

The inconsistency cannot be reconciled on the basis of the arithmetic disparity that one bond ordered by one district judge was 20 times the cost assessible by the rules ($10,000) and the other bond (Lykes) only six times the assessible costs ($3,000), however gratuitously weighted with the stigma of the adjectival pejorative "frivolous."[3]

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[3] For "costs on appeal" as redefined for bonding purposes in the D.C. Circuit see *Hoska* v. *U.S. Dept. of the Army,* 694 F.2d 270, 272-273 footnotes 3 and 4 (1982). These costs are set forth in Rules 28(g), 30(b) and (d), and 39(c) and (e) of the F.R.A.P. and General Rules 9 and 15 of the D.C. Circuit. The local rates permitted by the Court for appellee's costs are based on a maximum of 50 copies of a brief index and tabular matter not exceeding 100 pages each (5000 pages at .08 per page = $400), plus costs for binders and covers not exceeding $50 plus tax.

The discretion that the Court of Appeals would grant in *Federal Prescription Service* v. *American Pharmaceutical Association*, 636 F2d 755, 757 (D.C. Cir. 1980) to the District Court in aid of the appeal to decline to order a cost bond on the one hand cannot be stretched beyond the jurisdictional limits of a determination of real "costs" as the D.C. Circuit has defined them.

Rule 7 as it has been applied in this case, is a dangerous erosion of the right to appeal. The Rule was not amended in 1979 for the purpose of becoming a yardstick for a district judge to evaluate the merits of an appeal of his own orders by setting a price of admission to the Court of Appeals.

The discretion granted was for the purpose, in aid of the appeal, of having the lower court decide *whether* a security undertaking is needed to protect the prevailing party for recovery of those items specified in *Hoska* v. *U.S. Dept. of the Army, supra,* as costs and if so, the discretion to project a fair assessment therefore.

The district court's "inherent power" does not reach beyond the language of the rule to create a screening process to discourage frivolous or time-consuming or harassing appeals. After it has dispensed with the original action on the merits or has procedurally avoided such decision on other grounds, costs are costs are costs and nothing more.

Discretion reaches a jurisdictional limit when the district court would allow a prognosis of the merits of the appeal or the appellant's motivation for taking it to influence the size of the cost bond to be posted.

There is no support in the history, the advisory notes, or the language in the single sentence of the Rule to suggest that the limited exception to the long-standing concept—the general rule—that the district court is divested of power afer the notice of appeal is filed, grants inherent

jurisdiction to predetermine prospective sanctions arising from the appeal above. *See Speed* v. *Transamerica Corp.*, 18 F.R.D. 492 (D.C. Del. 1955).

Counsel for the appellee would have had the circuit court affirm this enlargement of the scope of the limited Rule 7 jurisdiction by citing cases where bonding requirements were preconditions to going forward *in the district court* in actions under that court's original jurisdiction. This misses the point. The issue here is not whether the district court can deter or condition frivolous actions from proceeding in its own jurisdiction. The issue here is to what extent does that power endure after the district court has proceeded to finality.

To bootstrap such power is to endanger the right to appeal itself. Neither the right nor the validity is conditioned on Rule 7. The discretion in "aid" of the appeal to set bond does not grant the power to decide whether double costs, damages, attorneys' fees and expenses will be warranted as sanctions in the court above and to thus spare the Court of Appeals the exercise of its weary burden under Rule 38 (F.R.A.P.). The district court instead, should be spared the requirement to throw the book at the perpetrator of a non-meritorious appeal until after the Court of Appeals considers the appeal on its merits. The risks of unfairness to a *pro se* litigant, like this one, is intolerably high in the prevailing negative attitude of the legal profession and the lower courts against such advocacy—particularly where no jury trial (with attendant media coverage) is statutorily founded.

If such substantive change was intended by the 1979 amendment from former Rule 73(c) F.R.C.P. as carried forward when F.R.A.P. was adopted, there is no indication of it in the advisory notes. Invocation for any purpose other than adjustment of the original $250 bond as indexed for inflation for printing or photocopy is "*ultra vires* of the act of which it is a creature." *See Walko Corp.* v.

Burger Chef Systems Inc., 554 F.2d 1165, 1168, 1169 footnotes 29, 30, 31. Discretionary quantum leaps under the Rule 7 rubric of a $3,000 bond for Lykes, a $10,000 bond for A.P.L. and a $25,000 bond for Farrell for briefing identical issues are prima facie abridgments of petitioner's right to appeal when dismissal is the result.

When rights are thus defeated, the otherwise innocuous rule has been misapplied and this should be reviewed by this Court. The failure to address the question by recalling the mandate in "Lykes" *in limine* before the panel below or en banc raises once again the fear expressed by Justices Black and Douglas on constitutional grounds in 374 U.S. 865, 870 as discussed in *Hart* v. *Wechsler*, Federal Courts and the Federal System, 2nd Ed. (1973) at 674-676.

The danger of misuse of the limited discretion granted by the rule was also apparent to the prosperous, monied appellant in *Westinghouse Credit Corp.* v. *Bader and Dufty*, 627 F.2d 221 (10th Cir. 1980), to whom the bond ordered in the amount of $5,000 would ordinarily be considered insignificant. The 10th Circuit, because of Westinghouse's size, found no abuse in the trial court setting a cost bond of $5,000, thereby overlooking the principle involved. Petitioner submits that when Westinghouse can raise the issue for $5,000 he can, with his extremely limited means, claim voidance of the rule at $3,000.

Rule 7—Rule 24 Linkage

The Rule 7 problem was addressed in *Page* v. *A. H. Robins Co.*, 85 F.R.D. 139, 140 (E.D. Va. 1980, Warriner, J.), in the guise of creating a linkage with appeals *in forma pauperis*. Such linkage was not intended in the 1979 amendment and the surface appearance of fairness and reasonableness of the solution found in *Page* v. *Robins, supra*, can result in an insidious modification of the substantive right.

Judge Warriner recognized the consequences of misuse of Rule 7 even though he viewed setting bond for costs as he would bail for a first offender. He weighed the value of the claim against the ability to pay on the assumption that "costs" of appeal and the ability to set bond therefore required a delicate balance to avoid the frivolous and yet protect the meritorious.

The sugar-coating of the hard pill by front loading Rule 7 in such manner was the refusal to dismiss without granting the appellant time to exercise his option under Rule 24 F.R.A.P. The Court viewed Rule 24 as a safety net against any abuse of discretion it committed and a potential brake on unwarranted amounts of security it might order which would bear adversely on appellant's financial ability to appeal.

The Court in *Page* v. *A. H. Robins, supra,* directed the appellants within 15 days to comply with the requirements of Rule 24(a) which would trigger its own requirement to state in writing the reasons for its decision on the Rule 24 motion. In the "Lykes" March 1, 1984 order (A-3) the Court combined its statement of reasons—"frivolous" with a seven day deadline for posting bond on pain of dismissal, foreclosing a Rule 24 application in that Court. Although petitioner's motion to vacate under Rule 59(e) F.R.C.P. raised the § 2072 issue it was denied on March 23, 1984 (A-30). Petitioner-appellants brief and appendix was printed, bound and filed on May 3, 1984 in accordance with the briefing schedule. The Court of Appeals then dismissed on June 1 with no suggestion of entertaining a Rule 24(a) motion. When petitioner-appellant requested the Court's permission to file a Rule 24(a) affidavit in the Petition for Rehearing with en banc suggestion in *In re American President Lines Ltd.* v. *Debtor,* the remand order issued without directly addressing an opinion on the *"Page* v. *Robins"* Rule 7–Rule 24 linkage. Indeed the order clearly avoided the opportunity for peti-

tioner to file the affidavit under its own jurisdiction while offering the district court the option to avoid a Rule 24 motion, and "the statement of reasons" required by a denial of it, as well.

The alternative authorized was district court discretion to set a new bond amount (the surplussage of the original $10,000 order had hurt rather than helped the credibility of the related amount fixed in "Lykes"). No opinion in the D.C. Circuit need thereby be taken on Judge Warriner's reading of district court jurisdiction in the 4th Circuit under the Rule to assist in clarification.

The Mailed Fist of B.R. 8006

The dismissal for failure to comply with an abuse of discretion in setting excessive bond under Rule 7 *violative* of 28 U.S.C. § 2072 must be viewed in the context of the district court basis for dismissal of the appeal (A-11) of the bankruptcy court decision. That dismissal was taken on the grounds that Bankruptcy Rule 8006 had not been complied with and was itself violative of 28 US.C. § 2075.

Bankruptcy Rule 8006 is that Court's interim version of Rule 10(b) of F.R.A.P. as amended in 1979. It has long been held that where there was no showing of prejudice, the operation of the rule would be suspended and the bankruptcy appeal considered on the merits notwithstanding the failure of appellant to designate the record and issues on appeal. *See In re Wilson,* 390 F. Supp. 1121 (D.C. Kansas 1975). There was no claim of prejudice here. In the dismissal by the district court in *In re Lykes, Debtor,* prejudice was not pleaded by the debtor, nor cited by the Court in its *sua sponte* dismissal.

In "Lykes, debtor" as in "American President Lines, debtor" the appellees were neither prejudiced nor misled—they had ample time to protect their interests or to claim bad faith in the appellate processing. They did neither.

> "Appellees were neither misled nor prejudiced by appellant's failure to serve a statement of issues, and they have ample time to seek a supplementation of the record—See Committee Note of 1966 to new Rule (75b) new Appellate Rule 10(b). Moreover, there is no evidence that appellant's omission here was made in bad faith. See *Drybrough* v. *Ware,* 111 F.2d 548, 550 (6th Cir. 1940). The motion to dismiss is therefore denied."

Island Creek Coal Co. v. *Local Union No. 1827 etc.,* 568 F.2d 7, 8 (6th Cir. 1977, *per curiam*). See also *In re Winner Corp.,* 632 F.2d 658 on remand, 29 BR 383 (4th Cir. 1980) and where the brief had already been filed (May 3, 1984) and motion to dismiss answered, *West* v. *Falconer* (D.C. Ill. 1980), 17 BR 929, is not to the contrary.

Petitioner *submits that the abuses of discretion in the Bankruptcy Rule 8006 (10b) dismissals should not be sheltered from review by abuse of Rule 7, F.R.A.P.* When the companion appellee (A.P.L.) complained that unless the bond set by the district court be so high as to create an "incentive for Mr. Safir to end what is an entirely burdensome litigation," the appellee was asking the Court to overstep the bounds of Rule 7 to create the undesirable consequences which concerned Judge Warriner in *Page* v. *Robins, supra*—denying the appellant the time to raise bond or the opportunity to move under Rule 24 where the Court would be required to justify its denial of the right to proceed in writing. The Court was asked not to secure the appellee from costs under Rule 39 but to sanction the appellant by barring appeal.

CONCLUSION

In a recent speech before the University of Florida Law School, Justice Rehnquist stated:

> "Perhaps the time has come to abolish appeal as a matter of right from the district courts to the courts of appeals, and to allow such review only where it is granted in the discretion of the appellate panel."

This forthright statement, controversial though it may be, to substitute discretionary for obligatory jurisdiction by expansion of the Evarts Act to the purpose of the Judiciary Act of 1925 would require congressional action of a substantive nature which the Congress has not yet undertaken. Until that time the legal buck cannot stop without a chance at review under certiorari policy in this Court.

Nevertheless procedural rules have been utilized to screen embarrassing cases or those deemed ill-advised out of the appellate process by obliging district court judges under extensions of jurisdiction beyond the scope of the Rules Enabling Act. It has even been argued that this Court itself has been too permissive in upholding interpretations of rules which do effect substantive rights protected under § 2072. *See Ely, The Irrepressible Myth of Erie,* 87 H.L.R. 693 (1974).

Rule 7 as amended in 1979, and as this petition shows, can be misapplied as one less-than-forthright interim foreclosure device prior to implementation of the distinguished Justice's stated innovations. When that Rule is utilized on the appellate level to shield from review patently erroneous misapplication of other procedural rules such as Bankruptcy Rules 8005 and 8006 and when that established pattern remains unchecked, procedure has won out over substance. Justice Rehnquist's substantive remedy for the proliferation of appellate review may be unnecessary because procedural manipulation can make and, as this litigation attests, has made the problem more apparent than real.

Since the former requires future Congressional approval and the latter falls short of present Congressional intent petitioner prays that the writ be granted.

MARSHALL P. SAFIR
271 Grand Central Pky.
Floral Park, N.Y.
718-225-0210

SUPREME COURT OF THE UNITED STATES

No. A-292

MARSHALL SAFIR,
Petitioner

v.

LYKES BROS. STEAMSHIPS CO., INC.

ORDER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s).

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 29, 1984.

/s/ Warren E. Burger
Chief Justice of the
United States

Dated this 19th
day of October, 1984

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5107 September Term 1983
Civil Action No. 84-00308

In Re:

Lykes Bros. Steamship Co., Inc.

Marshall P. Safir,

Filed June 1, 1984

Appellant

Before: Ginsburg, Scalia and Starr,
Circuit Judges

O R D E R

Upon consideration of appellee's motion to dismiss, and of the response thereto, it is

ORDERED by the Court that the motion is granted. Appellant has failed to post the cash or bond required by Fed. R. App. P. 7 and the district court's order of March 1, 1984. Fed. R. App. P. 3(a) authorizes dismissal of the appeal. It is

FURTHER ORDERED by the Court, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on June 15, 1982.

Per Curiam

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-00308
(Bankruptcy No. 83-00289)

IN RE: Filed Mar 2, 1984

LYKES BROS. STEAMPSHIP CO., INC.,

Debtor

ORDER

Upon consideration of the motion of appellee, Lykes Bros. Steamship Co., Inc., for a bond and the record of this case as a whole, and it appearing that the appeal by Marshall P. Safir is frivolous, it is this 1st day of March, 1984,

ORDERED that Marshall P. Safir shall, within seven days from the date hereof, post cash or a bond with approved sureties with the Clerk of this Court, in the amount of $3,000 to ensure payment of costs and such fees that may hereafter be awarded Lykes by reason of Mr. Safir's appeal.

/s/ Gerhard A. Gesell
United States District Judge

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5107 September Term 1983
Civil Action No. 84-00308

In Re:

Lykes Bros. Steamship Co., Inc.

Marshall P. Safir,
Filed Aug 1, 1984
Appellant

Before: Ginsburg, Scalia and Starr,
Circuit Judges

O R D E R

On consideration of the Petition for Rehearing of Appellant filed June 14, 1984, it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam

For the Court:

GEORGE A. FISHER,
Clerk

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5107 September Term 1983
Civil Action No. 84-00308

In Re:

Lykes Bros. Steamship Co., Inc.

Marshall P. Safir,

Filed Aug 1, 1984

Appellant

Before: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

O R D E R

The Suggestion for Rehearing en banc of Appellant has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid Suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER,
Clerk

Circuit Judges Mikva and Bord did not participate in this order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5228 September Term 1983
Civil Action No. 84-00302

In Re:

American President Lines, Inc.

Marshall P. Safir,

Filed Jul 31, 1984

Appellant

Before: Robinson, Chief Judge,
Wright and Wald, Circuit Judges

O R D E R

Upon consideration of appellee's motion to dismiss, and of the responses thereto, it is

ORDERED by the Court that the motion is granted. Apellant has failed to pos the cash or bond required by Fed. R. App. P. 7 and the district court's order of June 29, 1984. It is within the district court's jurisdiction and sound discretion to require, and to set the amount of, a bond as security for costs on appeal. See Federal Prescription Sevice, Inc. v. American Pharmaceutical Ass'n, 636 F.2d 755, 757 n.2 (D.C. Cir. 1980); Fed. R. App. P. 38 and 39; Notes of Advisory Committee to Fed. R. App. P. 8. In view of appellant's failure, Fed. R. App. P. 3(a) authorizes our dismissal of the appeal. It is

FURTHER ORDERED by the Court, sua sponte, that the Clerk shall withhold issuance of the mandate herein until

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seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on June 15, 1982.

Per Curiam

For the Court:

GEORGE A. FISHER,
Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 84-0302 (Oberdorfer, J.)
Bankruptcy No. 83-00370
Filed Jun 29, 1984

IN RE AMERICAN PRESIDENT LINES, LTD.,

Debtor.

ORDER

Upon consideration of the motion of American President Lines, Ltd., for bond or other security pending appeal, and the court having fully considered the issues in connection therewith

IT IS ORDERED that the motion be, and hereby is GRANTED, and

IT IS ORDERED THAT Marshall P. Safir be required to post cash or a bond of $10,000.

/s/ Louis F. Oberdorfer
United States District
Judge

Dated:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-00302

IN RE: Filed Mar 9, 1984

AMERICAN PRESIDENT LINES, LTD.,

Debtor

ORDER

Appellant Marshall P. Safir is appealing from a dismissal with prejudice of his petition to place American President Lines Ltd., involuntarily in bankruptcy. American President Lines has moved to dismiss the appeal on the grounds that appellant failed to file a designation of record on appeal and statement of issues presented and has not otherwise prosecuted his appeal. Bankruptcy Rule 8006 requires that the designation of record and statement of issues be filed within ten days of the notice of appeal, which was filed on July 18, 1983. Appellant has taken no action

to further his appeal; rather, he request that the time for filing his brief on appeal be extended until after the resolution of an appeal in a similar case. Appellant has made no attempt to explain or remedy his continuing violation of Rule 8006. Accordingly, it is this 9th day of March, 1984, hereby

ORDERED: that pursuant to Bankruptcy Rule 8001(a), the appeal is dismissed with prejudice. See In re Lykes Bros. Steamship Co., No. 84-0308 (D.D.C. Feb. 9, 1984).

/s/ Louis F. Oberdorfer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-00308

IN RE: Filed Feb 9, 1984

LYKES BROS. STEAMPSHIP CO., INC.,

Debtor

ORDER

Petitioner Marshall P. Safir has failed to comply with Bankr. R. 8006 requiring that petitioner file a designation of record on appeal and statement of issues presented within ten days after his notice of appeal was filed on July 18, 1983, and has not otherwise prosecuted the appeal. For the foregoing reasons, it si hereby

ORDERED sua sponte pursuant to Bankr. R. 8001(a) that the appeal is dismissed with prejudice.

/s/ Gerhard A. Gesell
United States District
Judge

February 9, 1984

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5228 September Term 1984

In Re:

American President Lines, Inc.

Marshall P. Safir,

Filed Nov 28, 1984

Appellant

Before: Robinson, Chief Judge, and Wright and Wald, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing, it is

ORDERED that the petition be and hereby is granted; and it is

FURTHER ORDERED, sua sponte, that the record in this case be and hereby is remanded to the District Court for a statement of the reasons for setting in the amount of $10,000 the cost bond required of the appellant, or for reconsideration of the amount thereof.

Per Curiam

For the Court:

GEORGE A. FISHER,
Clerk

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re	:	Case No.
	:	83-00289
LYKES BROS. STEAMSHIP	:	Chapter 7
CO., INC.,	:	Filed
Debtor	:	Jul 18, 1983

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
DISMISSING INVOLUNTARY PETITION WITH
PREJUDICE AND AWARDING COSTS AND
ATTORNEYS' FEES TO DEBTOR

Upon the Involuntary Petition filed herein on May 6, 1983, by Marshall P. Safir and upon Motion to Dismiss or Alternatively, for Summary Judgment by alleged debtor Lykes Bros. Steamship Company, Inc., and the Affidavit, Exhibits, and Brief in Support of such Motion, and Petitioner's Brief in Opposition thereto, the matter having come on for a hearing before this Court on July 7, 1983, and argument by both parties having been heard, and the Court having rendered its oral opinion, the

Court hereby finds, concludes, and orders as follows.

FINDINGS OF FACT

1. Petitioner Safir is not a creditor of the debtor or a holder of a claim against the debtor within the meaning of the bankruptcy laws. Petitioner's alleged claim results from litigation instituted by him for judicial review of orders of the Secretary of Commerce requiring debtor to refund certain merchant marine subsidies to the United States. In such litigation a judgment of the United States District Court for the District of Columbia has been entered requiring the Secretary to redetermine the amount of such refunds to the United States, and petitioner and debtor have both appealed from such order. Such appeals are pending. Any liability that may exist on the part of debtor as a result of such litigation

will be liability to the United States and not to petitioner. Any claim that petitioner may have to any payment resulting from such litigation will be a claim against the United States, not against debtor. Any claim petitioner may have against the United States (or debtor) at this time depends on judicial determination of disputed and uncertain issues of law and fact and is contingent at most, not only as to amount but as to liability, i.e, the fact of the claim itself.

2. There are more than twelve (12) creditors of this debtor who are not employees or insiders of debtor and are not transferees of a voidable transfer.

3. The debtor has shown by affidavit and exhibits that it is generally paying its debts as they come due and there is nothing to indicate that debtor is generally not paying its debts

as they come due. No creditor has sought to join in the petition. In the circumstances of this case, no purpose would be served by a general notice to creditors of the debtor prior to dismissing the petition.

4. The domicile, principal place of business, and principal assets of debtor are outside this district and have been outside this district continuously for more than 180 days prior to the filing of the petition.

5. There has been no consent to dismissal and debtor has not waived the right to judgment under subsection 303(i) of the Bankruptcy Code.

CONCLUSIONS OF LAW

1. Petitioner is not the holder of a claim against debtor. To the extent that petitioner may hold a claim against anyone, such claim is not contingent as to liability within the meaning of

sections 101(4) and 303(b) of the Bankruptcy Code.

2. Debtor has more than twelve (12) holders of a claim against it, excluding any employee or insider of the debtor and any transferee of a transfer that is voidable under the Bankruptcy Code.

3. Debtor is entitled to judgment against petitioner for costs and a reasonable attorney's fee.

ORDER

Upon such opinion, findings, and conclusions it is this 18th day of July 1983,

ORDERED, that debtor's Motion to Dismiss, or Alternatively, for Summary Judgment, be and it hereby is granted; and it is further

ORDERED that the Involuntary Petition herein be and it hereby is dismissed with prejudice; and it is further

ORDERED that costs and attorneys' fees in an amount to be determined by the Court shall be awarded to debtor from petitioner. Debtor shall submit an appropriate application on or before July 25, 1983.

/s/ Roger M. Whelan
United States Bankruptcy
Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re	:	Case No.
	:	83-00289
LYKES BROS. STEAMSHIP	:	
CO., INC.,	:	Filed
Debtor	:	Dec 7, 1983

ORDER AND JUDGMENT

Upon consideration of this Court's Order dated July 18, 1983 which granted the Motion to Dismiss or Alternatively for Summary Judgment of Lykes Bros. Steamship Co., Inc., ("Lykes"), ordered that the involuntary petition of Marshall P. Safir ("Safir") be dismissed with prejudice, and ordered costs and attorneys' fees be awarded to Lykes from Safir, and upon the application of Lykes for judgment for costs and attorneys' fees, and the motion of Lykes for leave to file amended application for judgment of costs and attorneys' fees, and the supporting documents thereto, and upon consideration of the record in this case as a whole, it appearing that the

application for costs and fees is well founded; it is by the Court this 7th day of December, 1983,

ORDERED: The judgment be, and hereby is, granted to debtor Lykes Bros. Steamship Co., Inc. against petitioner Marshall P. Safir for attorneys' fees in the amount of $21,786.77 and costs in the amount of $1,900.00, for a total sum of $23,686.77.

/s/ Roger M. Whelan
U. S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re	:	Case No.
	:	83-00365
FARRELL LINES, INC.	:	Chapter 7
	:	Filed
Debtor	:	Oct 20, 1983

ORDER AND JUDGMENT

Upon the Order Dismissing Involuntary Petition with Prejudice and Awarding Costs and Attorneys' Fees to Farrell Lines, Inc., dated July 1, 1983, from which order Marshall P. Safir ("Safir"), Petitioner, has appealed, and upon the Application of Farrell Lines, Inc. ("Farrell") for Judgment for Costs and Attorneys' fees from Safir dated July 18, 1983, and a hearing upon notice duly given having been held thereon on July 29, 1983, and Stroock & Stroock & Lavan having appeared pro se, and upon the record made at such hearing, and the Court having determined at such hearing that Farrell is entitled to an award of

attorneys' fees in the amount of $14,500.00 and an award for actual costs incurred subject to specific verification thereof, and upon the Supplemental Application of Farrell for Judgment for Costs and Attorneys' Fees from Safir dated September 6, 1983, setting forth and verifying the Applicant's costs and attorneys' fees with particularity, and due deliberation having been had, and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED that Farrell Lines, Inc. be and it hereby is awarded judgment against Marshall P. Safir in the amount of $18,411.40, consisting of $3,911.40 in costs and $14,500.00 in attorneys' fees in connection with proceedings before this Court as recited herein; and it is further

ORDERED, that Marshall P. Safir shall pay said judgment within one week from the date hereof, or in the alternative shall post a bond in the amount of $25,000.00 to secure Farrell's award of attorneys' fees pending his appeal from this Court's order of July 1, 1983, which bond shall be posted and evidence thereof provided to this Court and to Stroock & Stroock & Lavan within one week from the date hereof.

Dated: Washington, D. C.
October 20, 1983

/s/ Roger M. Whelan
United States
Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-2485
Bankruptcy No. 83-00365

IN RE: Filed Oct 31, 1983

FARRELL LINES, INC.,

Debtor

ORDER

Upon consideration of the motion of appellee Farrell Lines, Inc. to extend time to file and serve its brief herein until 15 days after the Bankruptcy Court has entered a final judgment for costs and attorneys' fees, and it appearing that the Bankruptcy Court on October 20, 1983, entered a final Order and Judgment on said fees and costs, it is hereby

ORDERED that appellee's motion is granted and appellee's time to file and serve its brief herein is extended to 15 days after appellant posts bond as required by the Bankruptcy Court, but said appeal shall be dismissed if no bond

is posted by November 7, 1983; and it is further

ORDERED that appellant's appeal brief shall be deemed filed as of September 8, 1983, the date originally received by the Clerk of Court.

/s/ Gerhard A. Gesell
United States District Judge

October 31, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-2485
Bankruptcy No. 83-00365

IN RE: Filed Nov 14, 1983

FARRELL LINES, INC.,

Debtor

ORDER

Upon consideration of the Application of Appellee, Farrell Lines, Inc., for an Order to Dismiss this Appeal pursuant to the Court's Order of October 31, 1983, and it appearing that appellant has not posted the bond required by the Bankruptcy Court in its Judgment and Order of October 21, 1983, it is by the Court this 14 day of November 1983

ORDERED, that this appeal be, and it is hereby, dismissed and appellant's montion to alter and amend the Order of October 31, 1983 is denied.

/s/ Gerhard A. Gesell
United States District
Judge

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re	:	Case No.
	:	83-00289
LYKES BROS. STEAMSHIP	:	
CO., INC.,	:	Filed
Debtor	:	Dec 7, 1983

ORDER

Upon consideration of petitioner Marshall P. Safir's ("Safir") motion filed July 18, 1983, for stay pending appeal and the reply in opposition of Lykes Bros. Steamship Co., Inc. ("Lykes") to said motion, and the proceedings filed herein, it is this 7 day of December, 1983

ORDERED that the motion for stay pending appeal be, and it hereby is, denied.

/s/ Roger M. Whelan
United States Bankruptcy
Judge

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re	:	Case No.
	:	83-00289
LYKES BROS. STEAMSHIP CO., INC.,	:	
	:	Filed
Debtor	:	May 10, 1984

ORDER

Upon consideration of the motion by Lykes Bros. Steampship Co., Inc. ("Lykes"), debtor/appellee, for an order requiring petitioner/appellant Marshall P. Safir ("Safir") either to pay the $23,686.77 judgment rendered by this Court on December 7, 1983 against him and in favor of Lykes or else to post a $30,000 appeal bond; and it appearing that Lyke's reference to Bankruptcy Rule 8005 is inapposite in that this Court denied on December 7, 1983 Safir's motion for a stay pending appeal of this Court's dismissal of his involuntary petition against Lykes and hence no stay pending appeal is in existence; and it further

appearing that the District Court has already on February 9, 1984 dismissed Safir's appeal from this Court's dismissal of his involuntary petition against Lykes;

NOW THEREFORE IT IS ORDERED on May 10, 1984 that the motion is DENIED without prejudice to the movant's right to request appropriate relief either in the U. S. District Court or the U. S. Court of Appeals, either pursuant to Rule 7, Fed. R. App. P., or otherwise, as may be appropriate.

/s/ George Francis Bacon, Jr.
United States Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-03048
Bankruptcy No. 83-00289

IN RE:

LYKES BROS. STEAMSHIP COMPANY, INC.
Debtor

Marshall P. Safir, Petitioner/
Appellant

ORDER

Upon consideration of the motion of appellant to vacate the Court's Order requiring the posting of cash or a bond as security for costs and fees in the amount of $3,000, it is hereby

ORDERED that said motion is denied and the psoting of securety shall remain as ordered.

/s/ Gerhard A. Gesell
United States
District Judge

March 23, 1984

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed Apr 19, 1984

IN RE MOORE MCCORMACK LINES, INC.,

Appellee-Debtor

Civil Action No. 84-309

O R D E R

Upon consideration of the appeal herein from the Order of July 18, 1963, entered by the Honorable Roger M. Whelan, then United States Bankruptcy Judge for the District of Columbia, which dismissed with prejudice the involuntary petition of appellant Marshall P. Safir and the motion of appellee Moore McCormack Lines, Inc., to dismiss the appeal, and it appearing that appellant knowingly failed to file a statement of issues and designation of record as required by Federal Rule of Bankruptcy Procedure 8006, it is this 19th day of April, 1984,

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ORDERED that the instant appeal be, and hereby is, dismissed pursuant to Bank. R. 8001(a) and it is further

ORDERED that the above-captioned matter be, and hereby is, dismissed with prejudice.

/s/ Norma Holloway Johnson
United States District Judge